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In the Matter of an Arbitration between

A.I.W.U., Local 61

and

7-UP/RC BOTTLING COMPANY

Re: Grievant Robert Flasch

Case Number 040506-043170-A

Grievance Numbers 165-06

AWARD OF ARBITRATOR

THE HEARING

On March 23, 2005, an arbitration hearing took place between The Amalgamated Industrial Workers Union, Local 61 [Laborers International Union, North America; National Federation of Workers Unions (NFIU/LIUNA)], hereafter “Union,” and 7-Up/RC Bottling Company, hereafter “the Company” before the undersigned in a conference room at the Union Hall, 3544 East Slauson Avenue, Maywood, CA. The hearing was pursuant to agreement of the parties and Section 20.00 – Arbitration of the Revised Labor Agreement between the parties effective October 1, 2000, through September 30, 2005, hereafter “Collective Bargaining Agreement” or, simply “CBA.” The Union was represented by Ron Bitonti, A.I.W.U. and the President of the Local, John Romero. The Company was represented by Attorney James A. Bowles, of Hill, Farrer & Burrill, LLP. At the hearing documentary and oral evidence was taken. The Grievant was present and testified. The taking of evidence concluded in the early afternoon the day of the hearing but the Parties were given leave to file closing briefs by way of summation until two weeks after receipt of reporter’s transcript. The Award is to be rendered within thirty days after receipt of the briefs which were received in due course.

ISSUES

The parties did not agree on a statement of the issues and the Company contended that the Arbitrator lacked jurisdiction to hear the grievance as will appear with more particularity below. However, it was agreed by the Parties that the arbitrator could formulate a statement of the issues. For purposes of this decision, the Arbitrator will consider all the issues put to him by the parties. They are:

1. Is the grievance subject to the grievance and arbitration procedure of the labor agreement?
2. Did the Company violate the CBA by discharging grievant?
3. Was grievant terminated without just cause?

If the answer to the first two or number 3 is “yes,” what is the appropriate remedy?

FACTS (as found by the Arbitrator)

The CBA contains a “no strike/” “no lockout” provision at Section 22.00. Because the language of that section is crucial to understanding the reasoning which follows, the provision is set out in full below.

22.01 It is the purpose and intent of the parties hereto that all grievances or disputes arising between them be settled peacefully by negotiations, conciliation and arbitration pursuant to Section 19.00 and 20.00, with continuous and uninterrupted conduct of the business of the Company and orderly relationship between the Company and the Union and the employees covered by this Agreement, as essential considerations of this Agreement. The Company agrees not to engage in any lockouts. It is therefore agreed that the Union and employees covered by this Agreement, individually and collectively, jointly and severally, will not for any reason or cause, during the term of this Agreement or during the pendency of negotiations for a renewal, extension or modification of this Agreement shall call or engage in, sanction or assist in, or cause, provoke, or take part in stoppage or other curtailment or interference with work, in or about any place in which the Company is engaged in the production, delivery or supply of any product or in furnishing any service.

The Union and the Company agree, respectively, to take adequate steps in every claim of violation of this provision to enforce this Section. The following shall not be considered a lockout within the meaning of this Agreement, any shutdown or reduction in operations or work due to a decrease in volume of business or other business reasons, lack of sales, shortages of materials, conditions beyond the power of the Company to control. Any violation of the foregoing provision

1 may be made the subject of a disciplinary action, including discharge, and such
2 action may not be raised as a grievance under this Agreement.

3 22.02 Honoring of picket lines Refusal of any employee to go through a
4 legitimate picket line recognized by the Union shall not be a violation of this
5 Agreement.

6 The CBA also provides grounds for termination at Section 9.01. The most important
7 subsection for purpose of this hearing is 9.02:

8
9 9.02 The Company retains the sole right to discipline and/or discharge employ-
10 ees for just cause. . . .

11 Except for discharge for dishonesty, intoxication, insubordination, proven
12 drug abuse, or willful damage to persons or property, a regular full-time employee
13 shall not be discharged unless he has two (2) previous warning notices in writing.
14 Such discharge is subject to the grievance and arbitration provisions of this
15 Agreement in case of dispute. Warning notices shall be effective for a period of
16 time not to exceed twelve (12) months from the date of issuance. Following the
17 expiration of such period of time, such warning notices shall be null and void, but
18 shall remain in the employee's personnel file.

19 Part of this decision depends upon an interpretation of the sections quoted above. The
20 interpretation is a mixed question of law and fact and will be handled in the Discussion portion
21 of this decision, below.

22 The backdrop to this case is that the events occurred during the Retail Clerks' strike
23 against Ralph's, Albertsons, and Von's supermarkets and, more particularly, events of October
24 16, 2003.

25 As far as the facts concerning the conduct of Grievant are concerned, the arbitrator finds
26 that the Company's version of what happened is, by the great weight of the evidence, more
27 credible. It is clear that, during work hours on October 16, 2003, Grievant approached a
28 driver/merchandiser from another company, hereafter "Pepsi," and asked that driver, Reith,
29 pointed questions about why the driver was not supporting the retail clerks strike. Reith was in
the process of unloading his truck to service Foothill Food and Drug, a store that was not being
struck by the retail clerks. Grievant even suggested that Reith was not loyal to the union cause
and Reith testified that Grievant said to him that "when this is all over with, somewhere along

1 the lines, you know, it's going to come back to you or we're going to get back at you one way or
2 another." Mr. Aguirre, a supervisor for Pepsi was on the scene and he recalled Grievant saying:
3 "And when this is all over, we're going to get you" Grievant referring to Reith. The evidence
4 was also that Grievant misrepresented himself to be somehow affiliated with the Teamster's Un-
5 ion and thus authorized to speak with Reith about the strike since the Teamster's were apparently
6 honoring the picket lines of the Retail Clerks. From Reith's testimony, however, it was clear
7 Reith was not much troubled by the encounter.

8 Based principally on a letter from Aguirre and, after an investigation, Grievant was ter-
9 minated on or about November 18, 2003. The letter of termination stated the reasons for termi-
10 nation. The first reason was that Grievant violated the "no strike" provisions of the CBA quoted
11 above. The other reasons for termination were set forth in the letter, which the arbitrator quotes
12 below.

13 You are also in violation of the Company's General Rules of Conduct;
14 Rule #4 (The making of false, or malicious statements concerning the Company
15 its products or its customers), Rule #5 (Threatening, harassing, disorderly con-
16 duct, or physical violence), Rule #8 (Sabotaging, restricting or interfering with
17 production, sales, job accomplishment or work output) and Rule #14 (Engaging in
18 any conduct on Company business which could cause unfavorable impressions of
19 the Company or which is detrimental to the Company, its products, its reputation,
20 or its employees).

21 In addition to the foregoing Grievant on a separate occasion was alleged to have directed
22 picketers to block Reith's truck for twenty minutes from entering a Von's lot for deliveries to a
23 loading dock and was alleged to have given Reith "the finger" a couple of times after that. Since
24 neither of these incidents played any role in Grievant's termination, the Company asked the arbi-
25 trator to consider them regarding a remedy in the event the grievance is sustained.

26 DISCUSSION

27 It is clear from the facts recited that Grievant is an ardent union supporter and a foe of
28 those who do not exhibit what he believes to be outward signs of solidarity and loyalty to unions
29 and their activities. Furthermore, although Reith and Grievant have known each other for many
years and Reith denied any ill-will between them, there may have been other matters which may

1 have put these two men in conflict over union or non-union activities, but there was no evidence
2 of any such prior conflicts.

3 The arbitrator finds that the Union and Grievant's argument that the "no strike" provision
4 of the CBA was not intended to preclude 7-Up employees from supporting other worker's strikes
5 is correct and that the Company's reliance on that provision in terminating Grievant is misplaced
6 and incorrect. The arbitrator finds that the so called "no strike" provision in the CBA was in-
7 tended to prevent strikes by the Union against the Company and not to prevent Union members
8 from participating in behaviors related to strikes by other Unions against other employers. Bol-
9 stering that view is the fact that Union members are specifically permitted to honor picket lines
10 of other Unions engaged in other strikes or union activities. Furthermore, the traditional reason
11 for "no strike" clauses is for the Company obtain the promise of the Union to refrain from strik-
12 ing the Company in the CBA. In other words, the "no strike" provision applies between the par-
13 ties to the CBA and not outside of that agreement. That said, there may be other provisions of
14 the CBA or the rules of the Company which may be violated by employees who engage in labor
15 movement or union activities generally, but the rights of free citizens who do pro-union or pro-
16 labor things must be rather scrupulously protected and carefully proscribed. Therefore the arbi-
17 trator concludes that Grievant's conduct involved other union strikes against other companies
18 and not the A.I.W.U.'s, Grievant's and 7-Up's relationship.

19 With respect to the other reasons given for Grievant's termination, only one or two seem
20 to be sustained by the evidence. For example, only a very expansive reading of the facts herein
21 support a violation of Rule #4 (false statements about the company, its products or its custom-
22 ers). Besides, during labor disputes, even those involving other companies and unions, tempers
23 flare and persons often engage in hyperbole. Insofar as Grievant was taking time from his work
24 to chastise Reith, there might be a minor violation of Rule #8 (interfering with job accomplish-
25 ment or work output). But who is to say that Grievant was not using break time to spend what
26 had to be less than ten minutes berating the Pepsi man for his lack of solidarity. There was no
27 evidence that Grievant was "on the clock." Furthermore, Rule #14 (disparagement) was broken,
28 if at all, in a tangential and inconsequential way. The arbitrator doubts whether Grievant's inter-
29

1 action with Reith did much to disparage 7-Up in the mind of the Pepsi driver that was not al-
2 ready present in Reith's mind as a former 7-Up employee.

3 What we are left with is the potential violation of Rule #5 (threatening or harassing). The
4 arbitrator believes there is some question whether what was said by Grievant amounted to a
5 threat of physical violence. Certainly none took place then or after the event. Furthermore, there
6 is some question about whether a company can discipline an employee member of a union for
7 making vague threats during a heated labor/management dispute especially when the threat is
8 susceptible of interpretation that does not involve violence and comes during the heat of labor
9 strife. Finally, a termination based upon this alleged work-related confrontation must, according
10 to the Company rules, be preceded by two written warnings. There are no written warnings in
11 this case and no evidence that Grievant was working at the time the incident occurred. It seems
12 to the arbitrator that some mild form of discipline such as a written reprimand out to have been
13 doled out and only after a thoughtful consideration of what offenses against the Company really
14 occurred on October 16, 2003 or thereafter.

15 As far as the incident that took place on November 18, 2003, since it formed no part of
16 the decision to terminate and appears to have involved something similar to what occurred on
17 October 16, it does not affect this decision in any material way.

18 19 AWARD

20 The grievance is sustained and the grievant is directed to be reinstated with back pay and
21 allowances.

22 Respectfully submitted,

23 May 9, 2005

24 _____
HADLEY BATCHELDER, Arbitrator